U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 21 March 2007

Case No. 2006-LHC-00531
OWCP No. 08-125943

In the Matter of

A. S.,

Claimant,

v.

M. BOWLING MARINE, INC.,

Employer,

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS,

Party-in-Interest.

APPEARANCES:

John J. Osterhage, Esq.
Warsaw, Kentucky
For the Claimant

L. Leeann Bailey, Esq.
Boehl, Stopher & Graves, LLP
Paducah, Kentucky
For the Employer

BEFORE: Larry S. Merck
Administrative Law Judge

DECISION AND ORDER – GRANTING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act ("LHWCA" or "the Act"), 33 U.S.C. §

901, et seq., and implementing regulations found at 20 C.F.R. Part 702, brought by A. S. ("Claimant"), against his former employer, M. Bowling Marine, Inc., ("Bowling Marine" or "Employer"). The Act provides for payment of medical expenses and compensation for disability or death of maritime employees other than seamen injured on navigable waters of the United States or adjoining areas. While employed with Bowling Marine, Claimant alleges that he injured his back, which resulted in his disability.

Claimant, represented by counsel, appeared and testified at the formal hearing held July 25, 2006, in Evansville, Indiana. I afforded all parties the opportunity to offer testimony, question witnesses, and introduce evidence. At the hearing, Claimant's Exhibits ("CX") 1 through 12 were admitted into evidence without objection and Employer's Exhibits ("EX") A through T were admitted into evidence without objection. Transcript ("TR") at 7-12. As agreed upon at the hearing, the parties timely submitted their stipulations, which are hereby admitted as Joint Exhibit ("JX") 1. In addition, both parties timely submitted post-hearing briefs; and thereafter, I closed the record. I based the following findings of fact and conclusions of law upon my analysis of the entire record, arguments of the parties, and applicable regulations, statutes, and case law. Although perhaps not specifically mentioned in this decision, each exhibit and argument of the parties has been carefully reviewed and thoughtfully considered. Although the contents of certain medical evidence may appear inconsistent with the conclusions reached herein, the appraisal of such evidence has been conducted in conformity with the quality standards of the regulations.

STATEMENT OF THE CASE

Background:

Claimant worked for Employer on and off between 1993 and 2005, during Employer's busier months. He worked as a welder and did general maintenance.[1] Claimant alleges that on July 25, 2005, he injured his back while working for Employer, which resulted in his impairment. Claimant filed this claim under the Act on August 12, 2005. Employer then requested a formal hearing and the claim was transferred to the Office of Administrative Law Judges on December 15, 2005.

[1] Claimant's general maintenance work included mechanic work, sandblasting, painting, and deck hand work; however, he worked primarily as a welder. (TR 23, EX F).

Issues:

The issues before me are:

1. Whether the injury arose out of and in the course of Claimant's employment with Employer pursuant to Section 2(2) of the Act;

2. Whether timely notice of the injury was given by Claimant to Employer pursuant to Section 12(a) of the Act;

3. Whether Claimant has demonstrated the existence of physical harm and working conditions which could have caused such harm, thereby invoking the presumption of causation contained in Section 20(a) of the Act;

4. The nature and extent of Claimant's disability;

5. Whether Claimant is entitled to benefits pursuant to Section 8 of the Act;

6. Whether Claimant is entitled to medical care and treatment pursuant to Section 7 of the Act; and,

7. Whether Claimant's counsel is entitled to attorney fees and expenses pursuant to Section 28 of the Act.

(TR 12-13; JX 1).

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Stipulations:

The parties were able to reach the following stipulations:

1. The Act (33 U.S.C. § 901, *et seq*) applies to this claim;

2. Claimant and Employer were in an employer-employee relationship at the time of the injury;

3. Employer filed an undated first Report of Injury (Form LS 202 – Employer's First Report of Injury or Occupational Illness); however, the LS-202 was

believed to have been filed on or about August 31, 2005;

4. Claimant filed a request for compensation (Form LS-203 – Employee's Claim for Compensation) on or about August 12, 2005;

5. Claimant filed a timely notice of the claim;

6. Employer filed timely Notice of Controversion (Form LS-207 – Notice of Controversion of Right to Compensation) on August 31, 2005;

7. Claimant has not returned to his usual employment with Employer since the date of injury; and,

8. Claimant's average weekly wage at the time of injury was $280.00.[2]

(JX 1; TR 7-8).

Section 14(d) requires that, absent circumstances beyond its control, an employer wishing to controvert a claim must file notice of controversion with the Department of Labor within fourteen days of obtaining knowledge of the alleged injury, or being given notice of an alleged injury under § 12 of the Act, and not within fourteen days of learning that a claim has been filed. 33 U.S.C. §914(d); *Spencer v. Baker Agric. Co.*, 16 BRBS 205, 209 (1984); *see also Jaros v. National Steel Shipbuilding Co.*, 21 BRBS 26, 32 (1988) (date of injury, not date of claimant's termination, is relevant issue); *Wall v. Huey Wall, Inc.*, 16 BRBS 340, 343 (1984); *Miller v. Prolerized New England Co.*, 14 BRBS 811, 821 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982); *Davenport v. Apex Decorating Co.*, 13 BRBS 1029, 1041 (1981), *overruled in part by Huneycutt v. Newport News Shipbuilding & Dry Dock Co.*, 17 BRBS 142 (1985) (employer's notice of controversion was not timely where it was filed in close proximity to the time that claimant filed the claim, but more than six years after injury).

An employer's belief that the Act does not apply to a claim does not excuse the employer's responsibility to file notice of controversion within fourteen days of learning of the claimant's

[2] In their stipulations, the parties agreed to supplement the record regarding Claimant's average weekly earnings. *See* JX 1. In their closing briefs, both parties stated that Claimant's average weekly earnings were $280.00 at the time of the accident/injury.

injury. *Curtis v. Service Mach. Group*, 20 BRBS 501, 518 (ALJ) (1987). In addition, it is not necessary that the claimant show that prejudice resulted from the employer's late filing of notice of controversion for § 14(e) penalties to be assessed. *Miller v. Prolerized New England Co.,* 14 BRBS 811, 822 n.15 (1981), *aff'd*, 691 F.2d 45, 15 BRBS 23 (CRT) (1st Cir. 1982). Furthermore, a claimant may not waive his right to additional compensation under § 14(e). *Director, OWCP v. Cooper Assocs.,* 607 F.2d 1385, 1389 (D.C. Cir. 1979); *Harris v. Marine Terminals Corp.,* 8 BRBS 712, 714 (1978).

The administrative law judge has discretion to decline to accept all of the parties' stipulations into evidence. *Warren*, 21 BRBS at 151. Stipulations regarding an incorrect application of law are not binding. *Duncan v. Washington Metropolitan Area Transit Auth.*, 24 BRBS 133, 135 n.2 (1990). I find that Employer filed the notice of controversion (Form LS-207) on August 31, 2005, the date the parties have stipulated to, which is supported by the other evidence of record. However, I find that Employer's notice of controversion was not timely filed within fourteen days of its knowledge of Claimant's injury pursuant to § 14(d), as was stipulated by the parties. Therefore, while I accept the parties' stipulation as to the date Employer filed notice of controversion, for the reasons stated above, I do not accept the parties' stipulation that the filing was timely.

The stipulations are admitted into evidence as JX 1, and, therefore, are binding upon Claimant and Employer. *See* 20 C.F.R. § 18.51; *Warren v. National Steel & Shipbuilding Co.*, 21 BRBS 149, 151-52 (1988). Although coverage under the Act cannot be conferred by stipulation, *Littrell v. Oregon Shipbuilding Co.*, 17 BRBS 84, 88 (1985), I find that such coverage is present here. I have carefully reviewed the foregoing stipulations and, with the exception of the parties' stipulation that Employer timely filed notice of controversion discussed above, I find the remaining stipulations are reasonable in light of the evidence in the record. As such, the remaining stipulations are hereby accepted as findings of fact and conclusions of law.

Summary of the Evidence

Claimant's Testimony and Deposition:

Claimant was born on March 28, 1972, and is a resident of Henderson, Kentucky. (TR 15; EX F). He testified by deposition on November 11, 2005, and at the hearing on July 25, 2006. He has two children, including a seventeen year-old daughter who

does not live with him. (TR 15-16; EX F). Claimant offered no evidence that his daughter is dependent on him for support. Claimant completed the eighth grade and never attended high school. (TR 17; EX F). After his first child was born, he left grade school and began working for his father welding and repairing barges in order to support his family. *Id.* After working for his father for about two or three years, Claimant began working for Hunter Marine Transport Barge Line, where he also worked repairing barges for about three years. (TR 18-19; EX F). Next, Claimant worked in a factory for about a year or two as a welder for Thompson Bit and Dye in Henderson, Kentucky. (TR 19; EX F). In the early 1990's, Claimant was hired to help build a sawmill in Dixon, Kentucky. (TR 20; EX F). Upon completion of the sawmill, he began doing maintenance at the mill. *Id.* In 1993, Claimant took his first job with Bowling Construction, repairing the bottom of a boat. *Id.* Claimant worked for Bowling Construction and at the sawmill until 1996 or 1997. (TR 21; EX F). Between 1997 and 2000, Claimant worked for Titan Contracting and Bowling Construction[3], rotating between Titan and Bowling depending on who had work for him at the time. (TR 22; EX F). In approximately 2000, he stopped working for Titan and worked exclusively for Employer. (TR 23; EX F).

During the month of July 2005, Claimant was working on a template for a river cell, which was approximately twenty feet tall. A barge cover top sat about four or five feet off the ground on top of several fifty-five gallon barrels that had been positioned next to the template. (TR 28-32; EX F). In order to do work on the highest level of the template, Claimant testified that he and his coworkers would climb up the side of the barge cover top in order to access the scaffolding that reached the top of the template. (TR 28; EX F). To get down, they would climb back down the scaffolding and jump off the cover top onto the concrete below. (TR 32; EX F). Claimant told Larry Kincaide, the "go-for" (sic) for the construction workers, that they needed ladders to get on and off of the barge cover top, but Mr. Kincaide refused to provide them. (EX F). At the hearing, Claimant testified that Employer eventually welded a ladder to the structure, but "it was put in last." (TR 64).

On July 25, 2005, Claimant jumped down from the barge cover top onto the concrete slab below and landed awkwardly. (TR 32; EX F). He immediately felt a sharp throbbing pain in the middle

[3] M. Bowling Marine, Inc., a separate corporate entity from M. Bowling, Inc. (or M. Bowling Construction, Inc.), was determined to be the responsible employer under the Act. Accordingly, by Order dated June 15, 2006, M. Bowling, Inc. was dismissed as a party to this claim. (ALJ 6).

of his lower back and down his right leg into his foot. (TR 33, 38; EX F). His knees gave way a little, although he did not fall to the ground. (TR 33). He held himself up against the cover top and did not move, while he rested for a while. *Id.* When the injury occurred, Claimant thought he had possibly strained a muscle in his back and hoped that the pain would go away on its own. (TR 38). Because Claimant only had to sit on a beam working with a torch the rest of the afternoon, he decided to try to work through the pain and to finish out the rest of the day. (TR 34; EX F). At the end of the day, Claimant told Mr. Kincaide that he believed that he might have injured his back and asked if the supervisor, Wayne Rigdon, was still there. (TR 71; EX F). Mr. Kincaide threw his arms in the air and said, "Well, everybody's gone. I don't know what to tell you." (TR 71). He then departed in his truck. Claimant testified that Billy Duncan and Darin Searight, two of his coworkers, were present at the template worksite when he injured his back. (EX F). Claimant's fiancée picked him up from work. The pain continued to get worse that afternoon and evening, and by the time that he was home and cleaned up, he had to lie down on ice to try to alleviate the pain. (TR 35; EX F). The pain worsened that night. (TR 36).

On July 26, 2005, Claimant could not return to work because he was in too much pain and his legs felt weak. He was in the room when his fiancée called sometime around eight or nine o'clock in the morning to report that he could not make it in to work because of his back. She told the man who answered the phone that Claimant probably would not be back to work until his back had gotten better. (TR 39). Claimant's pain continued to worsen throughout that day. (TR 38). He tried to "walk it out a little bit and get relief and hope it would just go away." *Id.*

On July 27, 2005, Claimant tried unsuccessfully to alleviate his back pain by applying ice and heat and by taking ibuprofen, but the pain remained constant. (TR 39). The following day, Claimant's legs started giving out whenever he was standing. His fiancée urged him to go to the hospital. Because he did not have a family doctor and he hoped the pain would subside on its own, Claimant did not go to the hospital on July 27, 2005. (TR 40). However, when the pain continued to intensify and his legs kept giving out, he became worried. On July 29, 2005, he went to the Emergency Room at St. Mary's Hospital. Claimant reported that he hurt his back when he jumped off of a platform at work. (TR 41). He was asked whether he had any history of back problems in the past. Claimant replied that he had injured his back about four months prior to this injury.

The hospital staff examined Claimant's back, gave him an injection of pain medication, and told him to go home and get some rest and to come back if his pain got any worse. (TR 41-42).

After he was discharged from the hospital, Claimant's fiancée drove him to the work site to retrieve his paycheck and to deliver a note from the hospital and a note that Claimant had written describing the accident. (TR 44; CX 8). His supervisor, Wayne Rigdon, handed him his check and said that he didn't need the notes. (TR 44). Claimant also testified that Darin Searight called him sometime between July 29, 2005, and August 3, 2005, to ask him how he was doing. (EX F). He testified that Mr. Searight said that "he asked Larry [Kincaide] and Wayne [Rigdon] one morning, 'how's A.Y. doing?' and he said they told him, 'F A.Y.'." *Id.*

Claimant returned to the Emergency Room at St. Mary's Hospital on July 30, 2005, after he fell several times because his legs kept giving out on him. (TR 42). This time, Claimant underwent an MRI on his back, after which he was admitted to the hospital for two days for observation and treatment, including pain control and bed rest. (TR 42-43). On August 3, 2005, Claimant's fiancée called Employer's office and told the office manager, Kay Jackson, that he needed medical assistance for his back injury. (TR 49; EX F). When Ms. Jackson began to get defensive, Claimant's fiancée handed the phone to Claimant. Ms. Jackson asked Claimant why he had not reported the incident to a supervisor, and he told her that there was no supervisor present at the time. (EX F). She then told him he should have reported it to Larry Kincaide. However, Claimant had been told that Mr. Kincaide was "nothing but a go-for," (sic) and therefore thought he was not the one to whom he should report. *Id.* At 2:30 p.m. that same day, Claimant received a phone call from Mark Bowling, Vice President of Bowling Marine. (TR 50; EX F). Mr. Bowling told Claimant not to return to work until he recovered, and that he "better not try to file Workman's Comp because [he] will fight [him] to the end." (EX F).

Besides having gone to St. Mary's Hospital, Claimant has also been seen by Dr. Starkey, a chiropractor, Dr. Rightmyer, a family physician, and Dr. Arias, a neurosurgeon. However, he has not been able to return to these doctors or to obtain any additional medical treatment for his back injury because Employer refuses to pay for treatment; and Claimant, having been out of work since the day of the injury, cannot afford to pay for the treatment himself. (TR 50-52; EX F). Claimant submitted

handwritten notes as exhibits to his deposition, which corroborate his testimony. (CX 9; EX F).

Debra Bailey's Hearing and Deposition Testimony:

Claimant's fiancée, Debra Bailey, testified by deposition on November 11, 2005, and at the hearing on July 25, 2006. Her testimony supports that given by Claimant. (TR 74-95; EX G). She testified that she picked Claimant up from work on the day of the accident and called the next day to inform Bowling Marine that he was injured and would not be able to return to work until he recovered. (TR 83-84; EX G). In the days following Claimant's injury, she tried to convince him to go to the hospital. She finally succeeded on Friday, July 29. (TR 85). On August 1, the day Claimant was released from the hospital, she called Bowling Marine again and spoke to Wayne Rigdon. (TR 87). Ms. Bailey explained that the Claimant had been put in the hospital and was in a lot of pain. *Id.* In response, Mr. Rigdon "just said okay". (EX G).

On August 3, Ms. Bailey had a phone conversation with Kay Jackson, Bowling Marine's secretary and office manager. (TR 89; EX G). Ms. Bailey told her that Claimant had jumped from a cover top at work and injured his legs and back, and that he would be filing a worker's compensation claim. Ms. Jackson asked Ms. Bailey why Claimant had not reported the injury when it occurred, and Ms. Bailey responded that there was no supervisor present. Ms. Bailey stated that it was at that juncture that Ms. Jackson became argumentative, telling her that Larry Kincaide was a supervisor and was present at the worksite on the day of the injury. (TR 89-90; EX G). Ms. Bailey then handed the phone to Claimant. *Id.*

Ms. Bailey also testified that she kept contemporaneous notes about what occurred each day in a small calendar notebook, as she does regularly for important events or occurrences that are going on in her life. (TR 82-85). She recopied the entries that contained pertinent information that she had jotted down on the dates surrounding Claimant's injury onto a sheet of paper, which was attached to her deposition as an exhibit. (EX G). Claimant also submitted Ms. Bailey's handwritten notes into evidence. (CX 9).

Mark Bowling's Hearing and Deposition Testimony:

Mark Bowling, who testified by deposition on November 11, 2005, and at the hearing on July 25, 2006, is Vice President of

Bowling Marine, which his wife owns. (TR 97, 115-116; EX M). At the hearing, he testified that Bowling Marine employs some of its workers year-round, but that most of them are laid off in the winter months when the company does not have as much work. (TR 101). Mr. Bowling testified that although Claimant was a good welder, he was not one of Bowling Marine's year-round employees. (TR 102; EX M). He also stated that Claimant was unreliable, as it was not unusual for him to just not show up for work. In describing his own job duties, Mr. Bowling testified that he bids for work for the company, although he tries to make it out to the worksites every day, but sometimes he is unable to do so. (TR 104). He also testified that all employees are informed when they are hired that they should report job-related injuries to a supervisor immediately. *Id.* However, Mr. Bowling acknowledged that he was not certain when Claimant would have been informed of this policy, since he worked off and on as his services were needed for six or seven years. (TR 118).

Mr. Bowling testified that more than one ladder was available at the template worksite on the day of the accident and that employees were never asked or told to use the barge cover to get on or off of the template. (TR 103; EX M). Mr. Bowling testified that none of his employees reported that Claimant had injured his back at work, and that he only learned of the injury approximately a week and a half later when he received a call from Claimant requesting authorization for the payment of treatment for the injury. (EX M). His secretary, Kay Jackson, told him that Claimant called to request that Bowling Marine pay a hospital bill for the treatment of a job-related back injury that had occurred the week before. (TR 107-108, 113; EX M; EX L). Mr. Bowling testified that when he spoke to Claimant over the phone, he asked him why he had not reported the injury to a supervisor immediately. (TR 108; EX M). He refused to pay for any treatment, telling Claimant that he did not consider the injury to be "legit" and that he "wasn't going to pay for it." (TR 108). He then "hung the phone up on him." *Id.*

In his deposition, Mr. Bowling stated that Claimant had personally told him that the injury occurred on July 26, and after he reviewed his records, he discovered that Claimant had not worked that day. (EX M). He also testified that Claimant was known to complain about his health problems, but he only specifically recalled complaints pertaining to "mostly toothaches" and that Claimant had never personally complained to him about a previous back injury. *Id.* Mr. Bowling testified that

"immediately" after learning of Claimant's alleged injury, he had Claimant's coworkers come in to give written statements about what they recalled from the day that the injury allegedly took place. (TR 114-115; EX M). He stated that he wanted to have them go ahead and write down what they remembered before they forgot.[4] *Id.*

Wayne Rigdon's Deposition Testimony:

Wayne Rigdon, who testified by deposition on November 11, 2005, is a supervisor of the river division of Bowling Marine. (EX H). When asked if there were any other supervisors working for Bowling Marine, he identified only Richard Marksberry. *Id.* He explained Larry Kincaide's role with Bowling Marine by stating that "[h]e's just a — he's sort of a — he helps me. He's sort of a supervisor and a parts runner..." *Id.* Mr. Rigdon testified that Claimant never reported an injury to him on July 25, 2005. He also stated that Claimant did not come to pick up his check on July 29, 2005, nor did he give him a note describing his injury. However, he did recall that Claimant had sent a note requesting that his paycheck be given to Ms. Bailey, who had come in to pick it up for him, although he was not certain when she actually came in to pick up the check. Mr. Rigdon noted that Claimant had often complained of various health problems in the past, such as teeth problems and chest pains, but had never reported back pain to him. Mr. Rigdon claims that he never received any telephone calls about Claimant's injury from either Claimant or Ms. Bailey, but that it used to be common practice for employees to call the main office and not his worksite office when they were calling in to report that they were not coming to work. *Id.*

Thomas Hedgepath's Deposition Testimony:

Thomas Hedgepath is a welder/laborer for Bowling Marine. (EX I). He testified by deposition that he never saw Claimant jump from the template or the barge cover top. He stated that steps and ladders were available for use in accessing the template, and a ladder was built into the template itself as well. Mr. Hedgepath testified that he heard Claimant complain of back pain, but that "everybody else does the same." *Id.* He stated that he never saw Claimant injure himself on the job, and stated that no one was ever required to jump from the template. He stated that "[t]here was always an easily accessible way of

[4] The employee statements submitted by Employer are dated September 1, 2005, approximately four weeks after Mr. Bowling testified that he learned of Claimant's injury. (EX E).

getting down." *Id.* He also mentioned that, on occasion, he had seen Claimant taking medication from a prescription bottle while working. *Id.*

Stephen Davis's Deposition Testimony:

Stephen Davis is also a welder/laborer for Marine Bowling. (EX J). Mr. Davis testified by deposition that he never saw Claimant jump from either the template or barge cover and that Claimant never told him that he injured his back on the job. However, Mr. Davis testified that there were times when Claimant was working on the template while he was not there. He testified that there was a ladder attached to the template, but that it was the only one available. He also stated that Larry Kincaide was always there at the end of the day, and that he considered him to be a supervisor. *Id.*

Larry Kincaide's Deposition Testimony:

Larry Kincaide, who testified by deposition on November 11, 2005, is in charge of keeping track of the days and hours worked by Bowling Marine's employees. (EX K). He is also a mechanic lead person and does "a little bit of everything here around this river yard." *Id.* Mr. Kincaide testified that Claimant normally worked five days a week, as scheduled. *Id.* Mr. Kincaide identified the man known as "Dee", who Claimant believed might have witnessed his injury, as Darin Searight. However, Mr. Kincaide stated that Mr. Searight and three other workers were laid off on September 1, 2005. *Id.* Mr. Kincaide testified that Claimant never reported the injury to him, nor did anyone else report that Claimant was injured on the job. Mr. Kincaide stated that because he delivered materials to various worksites, it was "very possible" that Claimant's workdays could sometimes end while he was away and not at the worksite. He also stated that Claimant had complained to him of toothaches and chest pains in the past, but never mentioned any back pain. *Id.*

Kay Jackson's Deposition Testimony:

Kay Jackson, who testified by deposition on November 11, 2005, is the office manager and secretary for Bowling Marine. (EX L). She spoke with Ms. Bailey over the phone on August 3, 2005. She testified that Ms. Bailey called in to report that Claimant injured his back on July 26, 2005, and that he had been taken to the emergency room. During their conversation, Ms. Bailey handed the phone to Claimant. When she spoke with Claimant, he said that he did not report the incident to anyone

because there was no supervisor available that afternoon and he thought that nothing would come of the injury at the time that it occurred. Ms. Jackson also testified that Claimant had never worked on any "prevailing rate" jobs, which paid twenty-one dollars per hour, as he "hadn't been out of the yard and yard scale is fourteen dollars." *Id.*

Bowling Marine Employee Statements:

On September 1, 2005, Employer had several of Claimant's coworkers and supervisors fill out questionnaires, which asked questions about their recollections from July 25, 2005, the day that Claimant's alleged back injury took place, and whether Claimant had ever complained of a previous back injury. *Id.* None of the employees stated on the questionnaire that he or she remembered Claimant injuring his back on the day in question. (EX E). However, Darin Searight, one of the employees whom Claimant believed had witnessed his injury, did not complete a statement, as he and three other employees were laid off by Bowling Marine on September 1, 2005, the day the employees filled out the questionnaires. (EX K).

State Workers' Compensation First Report of Injury or Illness:

Claimant submitted into evidence the Form IA1, a State Workers' Compensation—First Report of Injury or Illness, which was prepared by Tina Piccolo of Ladegast & Heffner Claims Services, Inc., Bowling Marine's Workers' Compensation Claims Administrator for the Kentucky Associated General Contractors Self Insurers' Fund. (CX 10). On the IA1, Claimant's injury is reported as July 25, 2005. *Id.* Furthermore, the report states that Claimant sustained an injury to his lower back on July 25, 2005, while he had been "[b]uilding and welding [a] template for [a] river cell." *Id.* The report goes on to state that Claimant was "required to jumped (sic) off access of barge cover top [and] injured low back." *Id.* The form states that the Claims Administrator had been notified on August 31, 2005, and that Claimant had submitted an LS 203, the Employee's Claim for Compensation, on August 12, 2005. Tina Piccolo prepared the IA1 on September 1, 2005, by taking the information from the LS 203. *Id.*

Employer's LS-202 - First Report of Injury:

Employer submitted the Form LS 202, Employer's First Report of Injury or Occupational Illness, as evidence. (EX B). Federal regulations require employers to report employee injuries within

ten days of the injury, or of learning of the injury. 20 C.F.R. § 701.201. Furthermore, employers are required to provide specific information about the alleged injury, including the "cause, nature, and other relevant circumstances of the injury or death; and the "year, month, day, and hour when, and the particular locality where, the injury or death occurred." 20 C.F.R. § 701.202(c-d).

Other than Claimant's personal information, Employer included no pertinent information about the alleged injury. (EX B). Instead, the form was used to refute the occurrence of Claimant's injury. The form was neither signed nor dated, although it appears to have been sent by facsimile to an insurance company or investigator sometime in December 2005. (EX B). Therefore, Employer's LS-202 is not a valid first report of injury.

Employer's LS-207 - Notice of Controversion:

Employer has submitted into evidence several versions of its notice of controversion. (EX C). An LS-207 was filled out and signed by Bowling Marine's office manager, Kay Jackson, on August 31, 2005.[5] *Id.* Ms. Jackson recorded August 3, 2005, as the date of Employer's first knowledge of Claimant's injury, but stated that the date of the injury was "unknown". *Id.* On September 20, 2005, Employer submitted, through its attorney, a supplemental LS-207, which appears to be almost identical in substance to the document that had been completed by Ms. Jackson on August 31, 2005. A written statement accompanied the supplemental LS-207, stating that Claimant's wage information and the statements obtained from other Bowling Marine employees on September 1, 2005, were included and offered as evidence. *Id.*

An administrative law judge is entitled to evaluate the credibility of all witnesses and to draw his own inferences and conclusions from the evidence. *See Calbeck v. Strachan Shipping Co.*, 306 F.2d 693 (5th Cir. 1962), *cert. denied*, 372 U.S. 954 (1963); *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir.

[5] The LS-207 submitted by Employer as an exhibit at the hearing is not exactly the same as the LS-207 proffered as an exhibit to Ms. Jackson's deposition testimony. (EX L, exhibit 1; EX C). The hearing exhibit includes the following additional statement, which does not appear in the deposition exhibit, under the reason(s) that Employer controverted Claimant's right to compensation: "Please refer to Letter and Information provided." *Id.*

1961). At the outset it further must be recognized that all factual doubts must be resolved in favor of the claimant. *Wheatley v. Adler*, 407 F.2d 521 (5th Cir. 1969), *cert. denied*, 395 U.S. 921 (1970). Furthermore, it has been consistently held that the Act must be construed liberally in favor of the claimant. *Voris v. Eikel*, 346 U.S. 328 (1953); *J.V. Cozzolo, Inc. v. Britton*, 377 F.2d 144 (D.C. Cir. 1967). However, the United States Supreme Court has determined that the "true-doubt" rule, which resolves factual doubt in favor of a claimant when the evidence is evenly balanced, violates Section 7(c) of the Administrative Procedures Act, 5 U.S.C. § 556(d), which specifies that the proponent of a rule or position has the burden of persuasion by a preponderance of the evidence. *Director, OWCP v. Greenwich Collieries,* 114 S.Ct. 2251 (1994). Such burden of persuasion obliges the person claiming benefits to persuade the trier-of-fact of the truth of a proposition.

I find Claimant to be a credible witness and I give his testimony considerable weight in making my decision. I also find Ms. Bailey to be a credible witness, and I find that her testimony is probative. In addition, the other evidence proffered by Claimant supports his testimony, as well as the testimony of Ms. Bailey.

After reviewing the testimony and statements of Employer's witnesses, I note that Mr. Bowling testified that Employer "never even filled out a first report of injury." (TR 117). However, Employer submitted an undated and unsigned Form LS-202 – First Report of Injury as evidence in this case. (EX B). Additionally, Mr. Bowling testified that he obtained statements from his employees immediately upon learning of Claimant's injury, because he was concerned that they might not remember the incident if too much time passed. (TR 114-115; EX M). Mr. Bowling acknowledges learning of Claimant's injury no later than August 3, 2005. (TR 113). However, the employee statements were all signed and notarized on September 1, 2005, more than four weeks later. (EX E). In addition, Employer did not submit a statement from Darin Searight, whom Claimant identified as a likely witness to the injury. Mr. Kincaide testified that Mr. Searight was laid off on the day that the statements were obtained. (EX K). Additionally, Employer submitted the telephone message detailing Claimant's injury, which Ms. Jackson left for Mr. Bowling on August 3, 2005, and the LS-207 that Ms. Jackson completed on August 31, 2005, as Employer's exhibits at the hearing; however, these documents do not appear to be the same as they were when they were submitted as exhibits at Ms. Jackson's deposition. (*See* EX C, L-exhibit 1). Accordingly,

after taking into consideration the discrepancies in Employer's witnesses' testimony and documentary evidence, as well as the overall demeanor of the witnesses, I grant less weight to the testimony and other evidence proffered by Employer in this case.

Medical Evidence:

Treatment Records from St. Mary's Hospital:

According to the records of St. Mary's Medical Center, Claimant first sought treatment for back pain on March 11, 2005, after he injured his back while carrying a bundle of sheet metal up the stairs at his home. (EX N). He was diagnosed with an acute dorsal strain and treated with pain medication. He was instructed to follow up with his private physician as needed. *Id.*

On May 4, 2005, Claimant returned to St. Mary's complaining of back pain, but this time he reported that the pain began when he stepped down off the back of a truck. (EX N). He was diagnosed with a lumbar strain and was treated with pain medication. When discharged, he was given a prescription for pain medication and instructed to lift no more than fifteen pounds for the next five days. *Id.*

On July 29, 2005, Claimant returned to St. Mary's complaining of back pain. (EX N). The treatment report states that no new injury had occurred, but that Claimant had a previous back injury four months before. The report noted that the pain in Claimant's back radiated down to his legs. He was diagnosed with an acute/chronic low back pain and treated with steroids, pain medication, and muscle relaxants. *Id.* Claimant was released with instructions to take pain medication as needed and to follow up with his private physician. *Id.*

On July 30, 2005, Claimant returned to St. Mary's because his condition had worsened since being released the day before. (EX N). A lumbar MRI scan showed "moderate degenerative change at L4-5 and L5-S1, with a mild diffuse bulge at L4-5." *Id.* Based on the results of the MRI, Claimant was admitted to the hospital. Claimant was treated with pain medication and muscle relaxants, although neither of these seemed to relieve his pain very much. While in the hospital, he was seen by Dr. Christopher Sneed, who diagnosed "[m]echanical low back pain on the basis of degenerative change with exacerbation and secondary muscular spasm, possible nerve root irritation with lower extremity pain." *Id.* Claimant was discharged on August 1, 2005, with

instructions to begin physical therapy as an outpatient and to follow up with a primary care physician and with Dr. Sneed within one to two weeks. He was also instructed not to work until after seeing Dr. Sneed. *Id.*

Claimant returned to St. Mary's on August 6, 2005, and was seen by Dr. David Wesley Brewer, the Emergency Room physician. He was treated for persistent back pain related to his injury on July 25, 2005. (EX N). Claimant was treated with pain medication and was instructed to follow up with his personal physician, who he was scheduled to see four days later. *Id.*

Claimant again visited St. Mary's on September 16, 2005. (EX N). The emergency room nurse noted that Claimant complained of "low back pain which radiate[d] down into his left thigh posteriorly." *Id.* He was treated with pain medication and instructed to follow up with his personal physician and to return to St. Mary's for any change in, or worsening of, his symptoms. *Id.*

Claimant returned to St. Mary's at 9:30 p.m. on November 29, 2005, complaining of back pain, after falling when his legs gave out while he was coming down the stairs at his home about one to two hours earlier. (EX N). An x-ray was ordered, which revealed, "[a]ge indeterminate superior endplate irregularity of T12." *Id.* The Radiologist further noted that, in his opinion, the x-ray results "[w]ould favor chronic, though MRI could better evaluate for acute injury if there is sufficient acute pain at this level." *Id.* He was diagnosed with exacerbation of back pain related to his July back injury. *Id.* He was treated with pain medication and given instructions to follow up with a neurosurgeon. *Id.*

Claimant returned to St. Mary's on January 7, 2006, complaining of back pain that radiated down into his buttock. (EX N). The emergency room nurse noted that Claimant stated that he had not been seen for his back pain for two weeks, but while preparing to give Claimant an injection of Decadron, the nurse noticed a needle bruise on Claimant's buttock. *Id.* The nurse contacted Deaconess Hospital and discovered that Claimant had been seen three days before for his back pain. *Id.* The Assessment form included in the treatment notes is not totally clear as to whether Claimant was not completely forthcoming about his treatment at Deaconess Hospital, as the nurse made the notation that "[Patient] stated he saw [doctor] 3 days ago" on the form, and then gave Claimant an injection of Decadron and a prescription for a Medrol Dosepak, despite any concerns about

when Claimant had last received treatment for his back pain. *Id.* Dr. Brant Sanders, the emergency room physician who treated Claimant noted "some tenderness in his L-spine," and "some pain in the paravertebral spinal muscles." *Id.* The physician also noted that after reviewing his MRI, it did "not appear that there were any ruptured disks." *Id.* He further noted that "there [was] a small amount of herniation which is not impinging and probably not acute." *Id.* Claimant was discharged with a prescription for pain medication.

Treatment Records from Methodist Hospital:

Claimant twice visited the Emergency Department at Methodist Hospital, on November 18, and November 29, 2005. (CX 4; EX O). During both visits, he was treated for chronic back pain, which he reported as being related to a work-related injury sustained in July. *Id.* Claimant also reported that Employer refused to pay for his medical treatment and that he was trying to resolve the issue by pursuing a worker's compensation claim. *Id.*

When he reported to the Methodist Emergency Department at 6:18 p.m., on November 29, 2005, Claimant reported that he was experiencing severe back pain and restlessness and had run out of his pain medication. (CX 4; EX O). He was given an injection of pain medication and discharged at 7:10 p.m., with a prescription for pain medication and instructions to follow up with his physician in five to seven days. *Id.*

Treatment Records from Deaconess Hospital:

Claimant visited the Emergency Department at Deaconess Hospital four times complaining of back pain before his alleged injury occurred on July 25, 2005, including visits on May 15, 2005, June 3, 2005, June 11, 2005, and June 21, 2005. (CX 3; EX Q). During each visit, Claimant was given injections of pain medication and discharged with prescriptions for pain medication and instructions to follow up with his personal physician. *Id.*

Claimant visited Deaconess again on January 3, 2006, complaining of severe pain in his back. (CX 3; EX Q). He reported that his back pain was related to a work-related injury that he sustained in July 2005. *Id.* He was given an injection of pain medication and discharged with a prescription for oral pain medication and instructions to keep his appointment with his neurosurgeon, Dr. Arias, which was scheduled for January 16, 2006. *Id.*

Treatment Records from Owensboro Medical Health System:

Claimant visited the Emergency Room at Owensboro Medical Health System on October 18, 2005, complaining of back pain related to his work-related injury. (EX T). Claimant was treated with pain medication and given instructions to take the medication prescribed for him. *Id.*

Claimant visited the Emergency Room at Owensboro Medical Health System again on February 8, 2006, complaining of back pain that radiated down his leg. (EX T). He reported that he fell down some stairs after his legs had given out on him. He related this occurrence to his work-related back injury. *Id.* Claimant underwent a lateral scan of his lumbar region, which revealed no new injury. *Id.* However, the scan revealed "approximately 15% compression deformity of the superior endplate of T12." *Id.* The scan also revealed "minimal hypertrophic spurring anteriorly at multiple levels." *Id.* Claimant was treated with pain medication and given instructions to call as soon as possible to make an appointment in three days with Dr. Ruth Weiland.

Treatment Records from Dr. Jose Arias:

Claimant was seen by Linda Mitchell, a certified physician's assistant, and Dr. Jose Arias, of Neurosurgical Consultants, on January 17, 2006. (CX 6). Dr. Arias and Ms. Mitchell physically examined Claimant and reviewed his previous x-ray and MRI results. *Id.* Dr. Arias noted that Claimant's July 30, 2005, MRI "shows the presence of mild degree of degenerative changes at L4-5 and L5-S1 discs, with desiccation and dehydration, but no actual herniation." *Id.* Dr Arias did not see a present indication that surgery was needed, but "recommend[ed] a full course of physical therapy and muscle relaxants." *Id.* Claimant was given a prescription for both. *Id.* Claimant called complaining of continued problems with his back and legs on April 20, 2006, but he was unable to return to see Dr. Arias because Employer refused to pay for his treatment, he had no health insurance, and he could not afford to pay out-of-pocket. *Id.*

Treatment Records from Dr. A. David Starkey:

Dr. A. David Starkey saw Claimant on October 10, 2005. (CX 11). Claimant sought treatment for lower lumbar and bilateral leg pain. *Id.* Dr. Starkey noted that Claimant has been treated

conservatively with pain medication and muscle relaxants, but "due to his financial situation he has been unable to meet the appointments recommended for his continued care." *Id.*

Treatment Records from Dr. Gerald Rightmyer:

Dr. Rightmyer treated Claimant for his back pain between August 10, 2005, and September 20, 2005, seeing him three times during that period. (CX 4; EX R). In a letter dated April 7, 2006, Dr. Rightmyer stated that it was his impression that Claimant "was having back pain due to a lumbar strain and [sic] that occurred at work after he was jumping down onto the floor from about a 4-5 foot height and had sudden onset of sharp pain in his lower back and both legs." *Id.* Dr. Rightmyer stated that he had tried to "wean [Claimant] to a lower dose on his pain medications," but that Claimant continued to seek more medication. *Id.* Dr. Rightmyer ultimately dismissed Claimant as a patient on October 19, 2005, and referred him to a chronic pain specialist for further treatment because he felt that "[Claimant's] symptoms were out of proportion to the objective findings and because of his seeking of pain medications." *Id.*

Prescription Records:

Employer submitted Claimant's prescription records from Barry's Pharmacy from July 29, 2005, to May 05, 2006; from T & T Drugs Store from April 6, 2006, to March 23, 2006; and Walgreen's Pharmacy from May 15, 2005, to September 16, 2005. (EX P, S). These records include several prescriptions for the pain medication prescribed by the physicians and hospitals discussed above.

The opinions of Drs. Sneed, Arias, Starkey, and Rightmyer, contained within Claimant's hospitalization and treatment records, are based on the results of objective testing and physical examination. Therefore, these opinions are well-reasoned and well-documented. I find that the preponderance of the medical evidence of record supports Claimant's case for disability compensation.

Coverage by the Act:

For his claim to be covered by the Act, Claimant must establish that the injury for which he seeks benefits occurred upon the navigable waters of the United States, including any dry dock, or on a landward area covered by Section 3(a) of the Act. He must also establish that his work was maritime in

nature and not specifically excluded by the Act. These are known as the "situs" and the "status" requirements of the Act. 33 U.S.C. §§ 902(3), 903(a); *Director, OWCP v. Perini North River Associates*, 459 U.S. 297 (1983); *P.C. Pfeiffer Co., Inc. v. Ford*, 444 U.S. 69 (1979); *Northwest Marine Terminal Co., Inc. v. Caputo*, 432 U.S. 249 (1977). The situs test limits the geographic coverage of the Act, while the status test is an occupational concept that focuses on the nature of the worker's activities. *P.C. Pfeiffer Co., Inc.*, 444 U.S. at 78; *Bienvenu v. Texaco, Inc.*, 164 F.3d 901 (5th Cir. 1999) (en banc). The parties have stipulated that the claim is covered by the Act and I have accepted their stipulation. (JX 1).

Injury Arising Out of Employment:

Section 20(a) of the LHWCA, 33 U.S.C. § 920(a), provides a presumption that a claim comes within the provisions of the Act "in the absence of substantial evidence to the contrary." To establish a prima facie claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc. v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this prima facie case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. 33 U.S.C. § 920(a); *Hunter*, 227 F.3d at 287.

The term "injury" means accidental injury or death arising out of and in the course of employment. 33 U.S.C. § 902(2). In order to show harm or injury, a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152 (2nd Cir. 1991). An injury cannot be found absent some work-related accident, exposure, event or episode, and while a claimant's injury need not be caused by an external force, something still must go wrong within the human frame. *Schoener v. Sun Shipbuilding and Dry Dock Co.*, 8 BRBS 630, 632 (1978).

In order to successfully invoke the Section 20(a) presumption, Claimant must also demonstrate the existence of working conditions or circumstances that could have caused his injury. *United States Industries/Federal Sheet Metal, Inc. v. Director, OWCP*, 455 U.S. 608, 615 (1982). To establish a prima

facie claim for compensation, Claimant need not affirmatively establish a connection between work and harm. *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

Under the aggravation rule, an entire disability is compensable if a work-related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998) (pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995) (pre-existing back injuries). Moreover, the employment-related injury need not be the sole cause or primary factor in a disability for compensation purposes. Also, when a claimant sustains an injury at work that is followed by the occurrence of a subsequent injury or aggravation outside of work, the employer is liable for the entire disability if that subsequent injury is the natural and unavoidable consequence or result of the initial work injury. *Bludworth Shipyard, Inc. v. Lira*, 700 F.2d 1046 (5th Cir. 1983); *Hicks v. Pacific Marine & Supply Co.*, 14 BRBS 295 (1990).

Claimant has alleged that while working on a river cell template, during the course of his employment with Bowling Marine, he injured his back by jumping off of a barge cover top down onto a concrete slab below. (TR 32-38; EX F). He testified that he immediately felt a sharp throbbing pain in his lower back that radiated down into his legs. He further testified that he tried to work through the pain that afternoon because he was scheduled to do work that was not as strenuous in nature, something that Employer acknowledged as a common practice among workers in the industry. (TR 39-40, 119). Claimant complained of back pain on the day of the injury (TR 71), and his fiancée called Employer's office the following morning to report that Claimant was unable to return to work until his back was better. (TR 39). In addition, Mr. Bowling testified that Employer had knowledge of Claimant's injury on August 3, 2005, at the latest. (TR 113). Employer argues that Claimant did not immediately report his injury to a supervisor and that he did not report a new injury to the admitting nurse during his first visit to St. Mary's Medical Center after the injury. (Employer's Brief). However, the Board has held that the fact that a claimant's supervisor did not witness an accident does not establish that it did not occur, nor does the fact that a claimant did not report the accident to the physician who initially treated the injury, since the claimant reported the accident to subsequent physicians. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141 (1990). The Board has also held that "there is no requirement that a claimant accurately diagnose the source

of his pain prior to his being examined by a physician, and in fact, the claimant is not required to pursue a claim until he is aware of the relationship between his injury and his employment, even in the case of misdiagnosis." *Wimbush v. Universal Maritime Service Corp.*, BRB No. 04-0667(May 25, 2005) (*unpub.*).

Claimant submitted medical evidence which supports his testimony, including x-ray and MRI readings, records from numerous visits to St. Mary's Medical Center, Methodist Hospital, and Deaconess Hospital, and records from Drs. Arias, Starkey, and Rightmyer. (CX 2-7, 11). According to Dr. Christopher Sneed, the neurosurgeon who saw Claimant in consultation while he was admitted at St. Mary's Medical Center the weekend following the injury, the lumbar MRI scan done on July 30, 2005, showed "moderate degenerative change at L4-5 and L5-S1, with a mild diffuse bulge at L4-5." (CX 5). As discussed above, Dr. Sneed opined that Claimant suffered from "[m]echanical low back pain on the basis of degenerative change with exacerbation and secondary muscular spasm, possible nerve root irritation with lower extremity pain." *Id.* He recommended that Claimant follow up with him in approximately two weeks, but Claimant could not afford it.

Claimant testified that he wanted to undergo physical therapy and to see specialists for treatment, but Employer refused to pay for the treatment and he could not afford to pay for the treatment himself, as he was unable to work because of severe back pain. (TR 50-52). The hospitalization and treatment records admitted into evidence corroborate Claimant's testimony. (CX 2-7, 11).

Additionally, both Claimant and Mr. Bowling testified that at least some aspects of Claimant's job were physically demanding. (EX F, M). Claimant also submitted photographs of the worksite that help demonstrate that working conditions existed that could have caused his injury. (CX 1).

As discussed, *supra*, I find Claimant to be a credible witness and I grant his testimony more weight than that of Employer's witnesses. Claimant's evidence demonstrates that he injured his back in the course of employment on July 25, 2005, and that working conditions or circumstances existed that could have caused his injury. Therefore, I find that Claimant has established a prima facie claim for compensation, thereby invoking the Section 20(a) presumption.

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts — not mere speculation — that the harm was *not* work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-688 (5th Cir. 1999). To rebut the presumption, the employer must present specific and comprehensive medical evidence sufficient that severs the connection between the injury and the employment, and reliance on mere hypothetical probabilities in rejecting a claim is insufficient. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). If successfully rebutted, the Section 20(a) presumption no longer controls and the issue of causation must be resolved on the whole body of proof. *Hughes v. Bethlehem Steel Corp.*, 17 BRBS 153, 155; *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984).

Bowling Marine also submitted Claimant's medical records as evidence. (EX N-T). As discussed in detail above, I have found that these records support Claimant's testimony. Although some evidence exists in Claimant's treatment records from Dr. Rightmyer that demonstrates that he needed pain medication to help control his back pain, Employer has not provided specific and comprehensive medical evidence that is sufficient to sever the connection between Claimant's injury and his employment. In fact, as Mr. Bowling testified, Employer refused to pay for the treatment of Claimant's injury. (TR 108). Consequently, the medical evidence in this case is limited primarily to the hospitalization records for Claimant's multiple visits to hospital emergency rooms, which are primarily geared for treating acute injuries and pain, and prescription records that show that Claimant filled the prescriptions that were given to him. Employer's argument (Employer's Brief) that Claimant was not injured, but was seeking pain medication is unpersuasive. This argument amounts to a "hypothetical possibility" that is not supported by specific and comprehensive medical evidence. *See Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990). Employer's reference to Dr. Rightmyer's dismissal of Claimant as a patient, because in part he felt that Claimant displayed drug-seeking behavior, is insufficient to rebut the presumption. (Employer's Brief; CX 2; EX R). As previously noted, because Employer refused to pay for physical therapy or any other treatment, Claimant's options for controlling his back pain were limited.

An administrative law judge is not bound to accept the opinion or theory of any particular medical examiner. The judge may rely upon his or her personal observation or judgment to resolve conflicts in the medical evidence. A judge is not bound

to accept the opinion of a physician if rational inferences cause a contrary opinion. *Todd Shipyards Corp. v. Donovan*, 300 F.2d 741 (5th Cir. 1962); *Ennis v. O'Hearne*, 223 F.2d 755 (4th Cir. 1955). The trier-of-fact determines the credibility of the medical witnesses and such determinations are to be respected on appeal. *John W. McGrath Corp. v. Hughes*, 289 F.2d 403 (2nd Cir. 1961). In addition, the judge determines the credibility and weight to be attached to the testimony of a medical expert. *Pimpinella v. Universal Maritime Service, Inc.*, 27 BRBS 154 (1993). Accordingly, based on the reasons outlined above, I find that the medical records support Claimant's testimony and are not sufficient to rebut the Section 20(a) presumption.

Therefore, Bowling Marine has failed to present sufficient evidence to rebut the Section 20(a) presumption. Accordingly, I find that Claimant has established a prima facie case that he injured his back in the course of employment on July 25, 2005. As a result, he suffers from an impairment, which was contributed to, or aggravated by, his employment at Bowling Marine.[6] Employer had knowledge of Claimant's injury on July 25, 2005, when Claimant informed his supervisor that he had injured his back.

Nature and Extent of Claimant's Disability:

The Act defines disability as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial).

A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from a temporary disability, in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248, 251 (1988). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI). The determination of when MMI is reached, so that a claimant's disability may be said to be

[6] Even if Employer had rebutted the presumption, and I weighed all the relevant evidence together, I would continue to find that Claimant is entitled to compensation, because I find that a preponderance of the evidence demonstrates that Claimant's July 25, 2005, back injury was caused, or aggravated by, his employment with Bowling Marine.

permanent, is primarily a question of fact based on medical evidence. *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56, 60 (1985). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Louisiana Insurance Guaranty Assn. v. Abbott*, 40 F.3d 122, 125 (5th Cir. 1994); *Sinclair v. United Food & Commercial Workers*, 23 BRBS 148, 156 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18, 21 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446, 447 (1981).

To establish a prima facie case of total disability, Claimant must show that he is unable to return to his regular or usual employment due to his work-related back injury. *Elliott v. C. P. Telephone Co.*, 16 BRBS 89 (1984); *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 339 (1988). A claimant's credible testimony alone, without objective medical evidence, on the issue of the existence of disability may constitute a sufficient basis for an award of compensation. *Ruiz v. Universal Maritime Service Corp.*, 8 BRBS 451, 454 (1978); *Eller & Co. v. Golden*, 620 F.2d 71, 12 BRBS 348 (5th Cir. 1980). In addition, claimant's credible testimony of constant pain endured while performing work activity may constitute a sufficient basis for an award of compensation, notwithstanding considerable evidence that the claimant can perform certain types of work activity. *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, (5th Cir. 1991). When the facts support a finding in favor of either party, the choice between reasonable inferences is left to the Administrative Law Judge and may not be disturbed if it is supported by the evidence. *Id.* at 945.

A finding of maximum medical improvement is not necessary for an award of compensation for continuing temporary total disability. In fact, if claimant is shown to be disabled under the Act and maximum medical improvement has not yet been reached, the appropriate remedy is an award of temporary total or partial disability. *Hoodye v. Empire/United Stevedores*, 23 BRBS 341 (1990). In *Devine v. Atlantic Container Lines,* the Board affirmed the administrative law judge's finding that a claimant was permanently totally disabled as of the first work day which he missed, based on the medical evidence of record which established that his condition after that date appeared to be of an indefinite duration, despite evidence that he subsequently had major surgery and follow-up care. *Devine v.*

Atlantic Container Lines, G.I.E., 23 BRBS 279 (1990) (Lawrence, J., dissenting on other grounds).

In this case, very little medical evidence on the permanency of Claimant's disability exists because Claimant has undergone very little of the recommended treatment for his back injury because of his lack of financial resources and Employer's refusal to pay for medical treatment. Claimant testified that his back pain is so severe that he has been unable to work, and he has had no source of income since the injury. Ms. Bailey testified that Claimant has been unable to work since the accident and can no longer do any work around the house either. In addition, both Claimant's and Employer's witnesses have testified that Claimant has not returned to work since the accident occurred over a year ago, and that Claimant's job is physically demanding.

In addition, several doctors' notes were admitted as exhibits during Ms. Jackson's testimony. (EX L, exhibit 1). These notes all state that Claimant should not return to work until he is seen by a specialist, or has undergone more specialized treatment. *Id.* For the most part, Employer has refused to pay for Claimant's recommended treatment. While Employer appears to have paid for Claimant's first visit to Dr. Arias, payment for any necessary follow-up visits and a recommended full course of physical therapy was not authorized by Employer. When Employer refused to pay, the physicians required Claimant to make large out-of-pocket payments before they would see him. He testified that he borrowed money from his sister and sold some of his personal belongings in order to pay for some of the necessary treatment, but his lack of financial resources heavily restricted his treatment options. Claimant has also testified that his pain has worsened since the injury and has shown no signs of improvement. The medical evidence supports his testimony. Disability has been found on the basis of Claimant's credible complaints of pain alone. *Eller and Co. v. Golden*, 620 F.2d 71 (5th Cir. 1980). Furthermore, there is no requirement in the Act that medical testimony be introduced. *Ballard v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 676 (1978). Moreover, the burden of proof in a temporary total disability case is the same as in a permanent total disability case. *Bell v. Volpe/Head Construction Co.*, 11 BRBS 377, 389 (1979).

Therefore, based on the evidence of record, I find that Claimant has established a prima facie case of temporary total disability.

Once Claimant has established that he is unable to return to his former employment because of a work-related injury, the burden of persuasion is shifted to Employer, who must demonstrate the availability of suitable alternative employment or realistic job opportunities that the claimant is capable of performing, and which he could secure if he diligently tried. *New Orleans (Gulfwide) Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Preziosi v. Controlled Industries*, 22 BRBS 468, 471 (1989). While Claimant generally need not show that he has tried to obtain employment, he bears the burden of demonstrating his willingness to work once suitable alternative employment is shown. *Shell v. Teledyne Movible Offshore, Inc.*, 14 BRBS 585 (1981); *Trans-State Dredging v. Benefits Review Board*, 731 F.2d 199 (4th Cir. 1984); *Wilson v. Dravo Corp.*, 22 BRBS 463, 466 (1989). In *Hairston v. Todd Shipyards Corp.*, the Board affirmed the Administrative Law Judge's finding that claimant cannot return to his usual work where the Administrative Law Judge credited claimant's complaints of pain, despite the lack of medical corroboration. *Hairston v. Todd Shipyards Corp.*, 19 BRBS 6 (1986), *rev'd on other grounds*, 849 F.2d 1194, 21 BRBS 122 (CRT) (9th Cir. 1988). The Board has also affirmed a finding of temporary total disability when the employer failed to present any evidence of suitable alternate employment. *Clophus v. Amoco Prod. Co.*, 21 BRBS 261 (1988).

On the basis of the totality of the record, I find that Claimant has established that he cannot return to work as a welder. This finding is supported by Claimant's credible testimony and the numerous restrictions placed on him by several physicians. Accordingly, the burden rested upon Employer to demonstrate the existence of suitable alternative employment in the area. Employer has offered no evidence of alternative employment for Claimant. In fact, when asked on the Workers' Compensation Claims Administrator Request for Wage Information form whether Employer had any modified duty work available, Kay Jackson, who filled out the form, replied affirmatively, but further elaborated that "...we would rather not to [sic] offer this to [Claimant] at this time." (EX D). As Employer has not carried its burden, Claimant is entitled to a finding of temporary total disability. *American Stevedores, Inc. v. Salzano*, 538 F.2d 933 (2d Cir. 1976); *Southern v. Farmers Export Co.*, 17 BRBS 64 (1985).

Accordingly, I find that Claimant is entitled to continuing temporary total disability compensation, beginning on July 25,

2005, the date which Claimant first notified his supervisor of his work-related back injury.

Compensation for Disability:

> Section 6(a) of the Act provides:
>
> No compensation shall be allowed for the first three days of the disability, except the benefits provided for in section 7: Provided, however, That in case the injury results in disability of more than fourteen days, the compensation shall be allowed from the date of the disability.

33 U.S.C. § 906(a).

The Act further provides that a claimant who establishes temporary total disability shall receive compensation in the amount of sixty-six and two-thirds percent of his or her average weekly wages during the continuance of such disability. 33 U.S.C. § 908(b).

Claimant's injury resulted in a disability of more than fourteen days, so Claimant became entitled to receive disability compensation on July 26, 2005, the day that his work-related back injury prevented him from returning to work. The parties have stipulated that Claimant's average weekly wages are $280.00. (JX 1). Accordingly, Claimant is entitled to receive $186.68 a week, beginning on July 26, 2005.[7]

Section 14(e) Compensation:

Section 14(e) provides that Employer must either pay compensation or controvert Claimant's entitlement within fourteen days of its knowledge of the injury, not its knowledge that a claim has been filed under the Act. 33 U.S.C. § 914(e); *Spear v. General Dynamics Corp.*, 25 BRBS 132 (1991).

Accordingly, Claimant shall receive an additional ten percent of unpaid compensation due between July 26, 2005, the date that his work-related disability began, and August 31, 2005, the date that Employer filed notice of controversion.

[7] $280.00 x 66 2/3 = $186.68.

Therefore, Employer must pay Claimant $95.95 in additional compensation, pursuant to § 14(e).[8]

Medical Expenses:

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a); 20 C.F.R. §§ 702.401, 702.402. In general, the employer is responsible for those medical expenses reasonably and necessarily incurred as a result of a work-related injury. *Ingalls Shipbuilding, Inc. v. Director, OWCP*, 991 F.2d 163 (5th Cir. 1993); *Perez v. Sea-Land Services, Inc.*, 8 BRBS 130, 140 (1978). The Board has interpreted this provision broadly. *See, e.g., Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86, 94-95 (1989) (holding employer liable for modifications to claimant's house as medical expenses).

Pursuant to Section 7(b) of the Act, an employee has a right to choose an attending physician authorized by the Secretary to provide medical care. 33 U.S.C. § 907(b); 20 C.F.R. § 702.403. When a claimant wishes to change treating physicians, the claimant must first request consent for a change and consent shall be given in cases where an employee's initial choice was not of a specialist whose services are necessary for and appropriate to the proper care and treatment of the compensable injury or disease. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406(a); *see Armfield v. Shell Offshore, Inc.*, 25 BRBS 303, 309 (1992); *Senegal v. Strachan Shipping Co.*, 21 BRBS 8, 11 (1988). Otherwise, an employee may not change physicians after his initial choice unless the employer, carrier, or deputy commissioner has given prior consent. 33 U.S.C. § 907(c)(2); 20 C.F.R. § 702.406(a).

Section 7(d) of the Act sets forth the prerequisites for an employer's liability for payment or reimbursement of medical expenses incurred by a claimant by requiring a claimant to request his employer's authorization for medical services performed by any physician. 33 U.S.C. § 907(d); *Maguire v. Todd Shipyards Corp.*, 25 BRBS 299, 301 (1992); *Shahady v. Atlas Tile & Marble*, 13 BRBS 1007, 1010 (1981), *rev'd. on other grounds*, 682 F.2d 968 (D.C. Cir. 1982). Specifically, Section 7(d) provides:

[8] $186.68 x 5.14 (weeks) = $959.54 (compensation due prior to controversion) x 10% = $98.75 (§ 14(e) penalty).

> (1) An employee shall not be entitled to recover any amount expended by him for medical or other treatment or services unless–
>
> (A) the employer shall have refused or neglected a request to furnish such services and the employee has complied with subsections (b) and (c) of this section and the applicable regulations; or
>
> (B) the nature of the injury required such treatment and services and the employer or his superintendent or foreman having knowledge of such injury shall have neglected to provide or authorize same.

33 U.S.C. § 907(d).

When an employer refuses a claimant's request for authorization, the claimant is released from the obligation of continuing to seek approval for subsequent treatments, and thereafter need only establish that subsequent treatment was necessary for his injury in order to be entitled to such treatment at employer's expense. *Schoen v. U.S. Chamber of Commerce*, 30 BRBS 112, 113 (1996); *Anderson v. Todd Shipyards Corp.*, 22 BRBS 20, 23 (1989); *See also* 20 C.F.R. § 702.421; *Shahady v. Atlas Tile & Marble Co.*, 682 F.2d 968, 970 (D.C. Cir. 1982)(awarding reimbursement for medical expenses after being discharged by employer's physician); *McQuillen v. Horne Bros., Inc.*, 16 BRBS 10, 15-16 (1983) (allowing medical costs only if the claimant first notified the employer).

Section 7(b) of the Act authorizes the Secretary through his designees to oversee the provision of health care. 33 U.S.C. § 907(b); *see* 20 C.F.R. § 702.407. Administrative Law Judges have authority to order payment for medical expenses already incurred, and generally to order future medical treatment for a work-related injury. They do not have the authority to specify a particular facility to provide future treatment. *McCurley v. Kiewest Co.*, 22 BRBS 115, 120 (1989). On the other hand, where a claimant sought authorization for a single medical procedure which the employer denied, the judge does have the authority to determine the reasonableness and necessity of the procedure and issue an order directing the employer to pay for it. *Caudill v. Sea Tac Alaska Shipbuilding*, 25 BRBS 92, 98 (1991).

Bowling Marine must pay for the medical treatment already incurred by Claimant, as well as for future treatment of

Claimant's work-related back injury. However, the Fifth Circuit has held that while a claimant is entitled to medical benefits, he cannot receive an award for medical benefits absent evidence of medical expenses incurred in the past or treatment necessary in the future. The court added that a worker can file a claim for medical benefits if and when treatment becomes necessary in the future. In this case, Bowling Marine has maintained that Claimant's injury was not work-related and declined to pay medical expenses. Claimant has not submitted any documented evidence of the costs incurred for diagnostic tests or recommended treatment for his injury. Accordingly, I cannot award Claimant past medical benefits at this time, for there is no evidence in the record regarding medical expenses.[9]

Interest:

A Claimant is entitled to interest on any accrued unpaid compensation benefits. *Ion v. Duluth, Missabe and Iron Range Railway Co.*, 31 BRBS 75, 79-80 (1997); *Canty v. S.E.L. Maduro*, 26 BRBS 147, 153 (1992); *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, 8 BRBS 556, 559 (1978), *aff'd in part, rev'd in part sub nom. Newport News Shipbuilding & Dry Dock Company v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The purpose of interest is not to penalize employers but rather, to make claimants whole, as employer has had the use of the money until an award issues. *Newport News Shipbuilding & Dry Dock Co. v. Director, OWCP*, 594 F.2d 986, 987 (4th Cir. 1979); *Renfroe v. Ingalls Shipbuilding, Inc.*, 30 BRBS 101, 104 (1996); *Smith v. Ingalls Shipbuilding Div., Litton Systems, Inc.*, 22 BRBS 47, 50 (1989). Interest is mandatory and cannot be waived in contested cases. *Byrum v. Newport News Shipbuilding & Dry Dock Co.*, 14 BRBS 833, 837 (1982).

Interest is not due on the § 14(e) assessment. *Caudill v. Sea Tac Alaska Shipbuilding*, 22 BRBS 10 (1988), *aff'd mem. sub nom.; Sea Tac Alaska Shipbuilding v. Director, OWCP*, 8 F.3d 29 (9th Cir. 1993); *Cox v. Army Times Publishing Co.*, 19 BRBS 195 (1987).

Entitlement:

In sum, Claimant has established temporary total disability as a result of the back injury that he sustained on July 25,

[9] Claimant may submit bills for medical expenses previously incurred as a result of his disability to Employer, which is required to pay them in accordance with this opinion.

2005, while working for Employer. Accordingly, Claimant is entitled to temporary total disability compensation starting on July 26, 2005, the first day that he was unable to work because of his disability, through present and continuing. In addition, Claimant is entitled to additional compensation pursuant to § 14(e) of the Act. He is also entitled to receive interest on unpaid compensation and medical expenses, exclusive of the § 14(e) penalty compensation due pursuant to § 14(e) of the Act. Claimant is also entitled to medical benefits for the treatment of his disability pursuant to § 7 of the Act.

Attorney's Fees:

Having successfully established his right to compensation, Claimant's attorney is entitled to an award of fees under § 28(a) of the Act. 33 U.S.C. § 928(a); 20 C.F.R. § 702.134(a); *Director, OWCP v. Baca*, 927 F.2d 1122, 1124 (10th Cir. 1991). The regulations address attorney's fees at 20 C.F.R. §§ 702.132–135. Claimant's attorney has not yet filed an application for attorney's fees. Claimant's attorney is hereby allowed thirty (30) days to file an application for fees. A service sheet showing that service has been made upon all parties, including Claimant, must accompany the application. The parties have twenty (20) days following service of the application to file any objections. The Act prohibits the charging of a fee in the absence of an approved application.

ORDER

Accordingly, the claim for benefits of A. S. is GRANTED. I therefore ORDER:

1. Employer shall pay temporary total disability compensation to Claimant beginning July 26, 2005, in the amount of $186.68 a week, based on an average weekly wage of $280.00, in accordance with 33 U.S.C. § 908(b).

2. Employer shall pay an additional ten percent of the unpaid compensation payments that were due between July 26, 2005, and August 31, 2005, in the amount of $95.95, in accordance with 33 U.S.C. § 914(e).

3. Employer shall pay Claimant for all past and future reasonable and necessary medical care and treatment arising out of his work-related injury, pursuant to 33 U.S.C. § 907(a). Since Claimant failed to submit documented

evidence of past medical expenses, he must submit a separate application for past medical benefits.

4. Employer shall pay interest on accrued unpaid compensation benefits and medical expenses, other than § 14(e) penalties. The applicable rate of interest shall be calculated in accordance with 28 U.S.C. § 1961.

5. The District Director shall make all calculations necessary to carry out this order.

6. Claimant's counsel shall have thirty (30) days to file a fully supported fee application, serving a copy on Claimant and opposing counsel, who shall have twenty (20) days to file any objection.

A

Larry S. Merck
Administrative Law Judge